

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 21st January, 2019

Telecom Petition No.198 of 2018

Vodafone Idea Ltd. ... Petitioner

Versus

Union of India ... Respondent

BEFORE:

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Petitioner : Mr. Meet Malhotra, Sr. Advocate
Mr. Manjul Bajpai, Advocate
Mr. Jagjeet Singh Sahani, Advocate
Ms. Palak Verma, Advocate

For Respondent : Mr. Apoorv Kurup, Advocate
Mr. Avinash Rathi, Advocate

ORDER

By S.K. Singh, Chairperson – Heard Mr. Meet Malhotra, learned senior counsel for the petitioner and Mr. Apoorv Kurup, learned counsel for the respondent.

2. It would appear from the earlier orders, particularly those passed on 24.09.2018, 22.10.2018 and 11.12.2018 that this Tribunal, on hearing the parties in respect of interim relief, found that allowing the interim relief sought by the petitioner would amount to allowing the main relief itself substantially. Hence, respondent was given opportunity to file reply which is on record. Petitioner has also filed its rejoinder. The matter has been heard for final disposal in view of limited issue raised at the Bar.

3. The prayers including interim prayers made in this petition are as follows:

“In the aforesaid facts and circumstances, the Petitioner herein most respectfully prays that this Hon’ble Tribunal may be pleased to:

- (i) Quash and set aside the impugned condition 1(b) in the letter dated 09.07.2018 of the Respondent DoT as being manifestly arbitrary, discriminatory, illegal and unenforceable and grant consequential relief;
- (ii) Hold and declare that the Bank Guarantee demand for Rs.3322.44 crores is discriminatory and arbitrary and therefore, strike it down;
- (iii) Set aside and quash Clause 3(i) of the M&A Guidelines dated 20.02.2014 to the extent it provides as follows:

“.....In the event of judicial intervention in respect of the demands raised for one time spectrum charges in respect of spectrum holding beyond 4.4 MHz in GSM band/2.5 MHz in CDMA band before merger in respect of transferee (i.e. acquiring entity) company, a bank guarantee for an amount equal to the demand raised by the Department for one time spectrum charge

shall be submitted pending the final outcome of the court case.”

Or in the alternatively hold the same to be unenforceable against the Petitioner.

- (iv) Set aside and quash clause 3(m) of the M&A Guidelines dated 20.02.2014 to the extent it provides as follows:

“.....the one time spectrum charge shall be payable as per provisions in Para 3(i) above of these guidelines.”

Or in the alternatively hold the same to be unenforceable against the Petitioner.

- (v) Hold and declare that no Bank Guarantee can be demanded by UOI/DoT qua the Service Areas, where Petitioner did not hold any administratively allocated Spectrum on the date of NCLT order;
- (vi) Pass such other and further order(s) as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

INTERIM PRAYERS

- (vii) Stay the operation of the impugned condition 1(b)/ demand of Bank Guarantee(s) of Rs.3322.44 crores in the letter dated 09.07.2018 of the Respondent DoT;
- (viii) Direct DoT to forthwith return each and all Bank Guarantee(s) which have been wrongly demanded/collected/received/ought not to have been demanded/collected/received, by DoT;
- (ix) Pass ad-interim/interim/ex-parte order(s) in respect of the above prayer(s); and
- (x) Pass such other and further order(s) as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case.”

4. Learned senior counsel for the petitioner has submitted that the Condition No.1(b) imposed by the respondent in its letter dated 09.07.2018 is illegal being contrary to interim order passed by the Hon'ble Bombay High Court which is still subsisting and therefore, this Condition in the approval letter has been challenged through this petition. According to him, once the demand for One Time Spectrum Charge (OTSC) had been challenged before the Hon'ble High Court and an interim protection was granted, the respondent could not have treated that demand to be realisable for grant of approval for transfer of licences of Vodafone Mobile Service Ltd. (VMSL) and therefor, Vodafone India Ltd. (VIL) (collectively described as "Transferor"/"Vodafone Company") to IDEA Cellular Ltd. ("IDEA"/ "Transferor Company"). It has been pointed out that on receipt of the approval letter dated 09.07.2018 (**Annexure 'A'**) containing Condition 1(b), the petitioner immediately protested and through letter dated 13.07.2018 (**Annexure 'P'**) made a request to the Secretary - Telecom, DoT for withdrawal of the demand for bank guarantee of Rs.3322.44 crores from M/s IDEA, the Transferee Company. Detailed objections were raised to such demand. Specific reference was made to orders of this Tribunal dated 10.04.2018 in Petition No.55 of 2018 which involved similar issue in the context of grant of approval to Bharti Telecom and Telenor merger, and to the interim order of Bombay High Court granting interim protection to IDEA/Transferee Company. When no reply was received, IDEA submitted the bank guarantees for Rs.3322.44 crores along with letter dated 23.07.2018

(**Annexure R colly.**) with specific submission that the bank guarantees were being furnished under protest and without prejudice to their rights and contentions on the issue. It has further been pointed out that the order of this Tribunal dated 10.04.2018 in T.P. No.55 of 2018 was challenged before the Hon'ble Supreme Court which dismissed the SLP bearing No.11744 of 2018 vide order dated 09.05.2018.

5. According to the learned senior counsel for the petitioner, the issue decided by the order dated 10.04.2018 in Petition No.55 of 2018 in respect of validity of demand for a bank guarantee for OTSC from the Transferee Company which had interim protection from the Bombay High Court, was exactly similar to that arising in the present case.

6. The respondent had placed reliance, to defend their demand, on the provisions in the Merger & Acquisition Guidelines dated 28.02.2014 and upon two judgments of the High Court of Judicature of Madras in one and the same matter. After discussing such defence this Tribunal had passed an order in favour of the petitioner of that case (T.P.No.55 of 2018, Bharti Airtel Ltd.) and directed the concerned authorities of the Union of India to take the merger of the two companies and the licences on record on the basis of compliance of other relevant conditions. But similar stipulation as in the impugned Para 1(b) was not to be given effect to because it was held to be contrary to the interim order of the Bombay High Court.

7. Learned counsel for the respondent has submitted that the aforesaid view expressed in the order dated 10.04.2018 has been followed by this Tribunal in some other matters as well and it has consistently held that demand for OTSC or bank guarantee in lieu thereof could not be given effect to on the basis of Merger and Acquisition Guidelines if there was stay by a Court of Law in respect of such demand. It was made clear that this issue should not be confused with the issue as to the validity of demand for OTSC which is *sub judice*. According to him, justice and parity requires that the same view be followed in the present matter also.

8. Learned counsel for the respondent has reiterated the earlier stand of the respondent based upon provisions in the Merger and Acquisition Guidelines of 2014. He has further submitted that the respondent made an effort for early hearing and disposal of the pending Writ Petition of IDEA before Bombay High Court but could not succeed. An effort was also made to persuade this Tribunal that no coercion was exercised by the respondent and the petitioner itself submitted the bank guarantees under protest and therefore, the whole transaction does not amount to respondent acting contrary to the interim order of the Bombay High Court which prohibits the respondent from adopting any coercive action for the alleged non-payment of the impugned demands.

9. On behalf of petitioner, some other issues raised in their letter dated 13.07.2018 were reiterated by pointing out that whereas the demand of OTSC dues under challenge before the Bombay High Court is only of Rs.2113.50 crores, without any justification or opportunity to protest, the impugned demand for bank guarantee is for a much higher amount of Rs.3322.44 crores. It has been pointed out that in the case of Bharti and Telenor merger, the respondent had demanded a BG for the original OTSC dues only as raised in 2013 but in the case of petitioner it has revised and increased the demand by more than Rs.1000 crores. In reply, the respondent has claimed that the task of revising the demand is underway and soon the revised demand shall be served upon other telecom service providers like Bharti also.

10. The main issue falling for determination is whether the demand for the BG for OTSC dues whose recovery is barred by an interim order of Hon'ble Bombay High Court is lawful and whether there is any material to distinguish this issue arising in the present petition from the similar issue decided by this Tribunal vide earlier orders which are on record and some of which have been noticed. Had the petitioner not furnished the bank guarantees pursuant to the impugned paragraph, the issue as well as facts would have been entirely identical. The only difference is that for some compulsion, the petitioner decided to furnish the bank guarantees for OTSC but along with a detailed letter of protest. Hence, the issues are similar as decided by the earlier orders such as

in T.P. No.55 of 2018. Petitioner has been clearly coerced to furnish bank guarantees on account of OTSC for a value of Rs.3322.44 crores. There is no dispute that out of this amount, a demand for Rs.2113.50 crores has been impugned before the Bombay High Court and realisation of the same is prohibited on account of interim orders passed by that court.

11. In our considered view, the issue is same and there is nothing to distinguish this matter from the other matter in respect of the issue at hand. Hence, in order to maintain parity as well as in the interest of justice, we are persuaded to follow our earlier view. Accordingly, it is held that the impugned Condition 1(b) in the letter dated 09.07.2018 is contrary to the interim order passed by the Bombay High Court which is still subsisting in respect of OTSC demand for Rs.2113.50 crores. As a result the petitioner is held entitled for return of the bank guarantee furnished (under protest) to the extent of Rs.2113.50 crores only because a demand of OTSC for that amount only has been impugned before the Bombay High Court and is covered by its interim order. On account of the interim order the respondent is not entitled to use the bank guarantees furnished by the petitioner under protest to the extent of Rs.2113.50 crores for any purpose, much less for recovery of OTSC.

12. Although it was submitted on behalf of the petitioner and already noted earlier that the increase in the demand for OTSC by more than Rs.1000 crores is unjustified but there is no dispute that the interim order of the Bombay High

Court, which is the basis for granting relief to the petitioner in this petition, does not relate to the enhanced amount. It will be open for the petitioner, if it is so advised, to impugn the demand for enhanced amount noted above through any appropriate proceeding in accordance with law. However, since the enhanced amount is not presently under challenge and there is no judicial intervention in that regard so far, we are not persuaded to pass any order in respect of bank guarantees for the amount above Rs.2113.50 crores. In the facts of the case as existing today, no relief can be granted for the amount which is not under judicial intervention and subject matter of any order, interim or final.

13. The respondent is accordingly directed to return/release the bank guarantees of Rs.2113.50 crores to the petitioner forthwith and in any case within two months from today. In case the bank guarantees are not returned/released for that amount within the aforesaid time, the same shall be treated as invalid Bank Guarantees.

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(S. K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member